



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 8, 2013

Mr. Gary B. Lawson  
Strasburger & Price, L.L.P.  
901 Main Street, Suite 4400  
Dallas, Texas 75202-3794

OR2013-05600

Dear Mr. Lawson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 483219.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for all e-mails between two named individuals. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.110, 552.111, and 552.143 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>Although it appears you raise section 552.022 of the Government Code as an exception to disclosure, we note section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, you indicate some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-13914 (2012). In that decision, we ruled the system must withhold the submitted information under section 552.143(c) of the Government Code, with the exception of information the system must release pursuant to subsections 552.0225(b)(2)-(9), (11), and (13)-(16) of the Government Code. As we are unaware of any change in the relevant law, facts, and circumstances on which the previous ruling was based, then to the extent the requested information is identical to the information at issue in that ruling, we conclude the system may rely on Open Records Letter No. 2012-13914 as a previous determination and withhold or release such information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the prior ruling, we will consider the exceptions you claim.

Next, we must address the system's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the system received the present request for information on January 16, 2013. We understand the system was closed on January 21, 2013. We note this office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's deadlines under the Act. Thus, the system's ten-business-day deadline was January 31, 2013. While you raised sections 552.101, 552.103, 552.107, 552.110, 552.111, and 552.143 of the Government Code, rule 503 of the Texas Rules of Evidence, and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.104 or section 552.105 until after the ten-business-day deadline had passed. Thus, the system failed to comply with the requirements mandated by subsection 552.301(b) as to your arguments under sections 552.104 and 552.105.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by

law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Sections 552.104 and 552.105 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Thus, in failing to comply with section 552.301, the system has waived its arguments under sections 552.104 and 552.105, and may not withhold the information at issue on that basis. However, we will consider the applicability of the timely raised exceptions to the submitted information.

You argue some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. We note, however, section 552.110 is designed to protect the interests of third parties not the interests of a governmental body. Thus, we will not consider the system's arguments under section 552.110, and none of the submitted information may be withheld under section 552.110 on the basis of the system's interests.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the "Nasher"). You explain the Nasher has made allegations that glare emanating from the glass walls of the Museum Tower, a high-rise residential condominium owned by the system, is damaging the Nasher's art and vegetation and creating an unpleasant experience for visitors. You state representatives of Museum Tower and the Nasher recently participated in mediation efforts which were unsuccessful. You indicate all efforts short of litigation to resolve the dispute have failed and state the system anticipates being a party to any suit regarding Museum Tower, and you argue there would be legal and financial recourse against the system as a result of any suit. Based on your representations and our review, we determine the system has established it reasonably anticipated litigation on the date it received the request for information. We also find the information at issue is related to litigation the system anticipated on the date of its receipt of the request for information. Accordingly, the system may withhold the information you have marked under section 552.103 of the Government Code.<sup>4</sup>

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no

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<sup>3</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You argue the remaining information is excepted from disclosure under section 552.143 of the Government Code, which provides, in part,

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), (13)-(16) is confidential and excepted from the requirements of Section 552.021. This Subsection does not apply to a governmental body's purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities.

Gov't Code § 552.143(c). You argue the information pertains to the system's direct purchase, holding, or disposal of a restricted security. *See id.* § 552.143(d)(3) (defining "restricted securities" for purposes of section 552.143); *see also* 17 C.F.R. § 230.144(a)(3) (defining "restricted securities" as "securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving public offering"). You inform us the submitted information involves Museum Tower, L.P. (the "Museum Tower"), which you state is not a governmental body. You state the system's limited partnership interest in the Museum Tower, is a security acquired directly from the issuer of the security, the Museum Tower, in a transaction that did not involve a public offering. However, upon review, we find the system has failed to demonstrate how the remaining information pertains to the system's direct purchase, holding, or disposal of a restricted security. Accordingly, none of the remaining information may be withheld under section 552.143 of the Government Code.

We understand the system to raise common-law privacy for portions of the remaining information. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note an individual's name, address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an

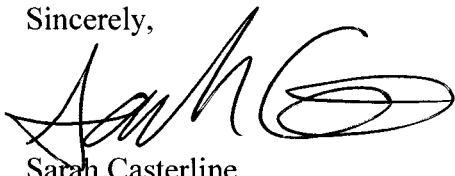
invasion of privacy). Upon review, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, to the extent the requested information is identical to the information at issue in Open Records Letter No. 2012-13914, we conclude the system may rely on that ruling as a previous determination and withhold or release such information in accordance with Open Records Letter No. 2012-13914. The system may withhold the information you have marked under section 552.103 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a stylized, cursive script.

Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/tch

Ref: ID# 483219

Enc. Submitted documents

c: Requestor  
(w/o enclosures)